Office-Supreme Court, U.S.
FILED
JUL 29 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-2023

In The

Supreme Court of the United States

OCTOBER TERM, 1984

INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC., THE CANANDAIGUA NATIONAL BANK AND TRUST COMPANY,

Petitioners,

vs.

MARINE MIDLAND BANK, N.A., WEGMANS FOOD MARKETS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT WEGMANS FOOD MARKETS, INC. IN OPPOSITION

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July 29, 1985

Daily Record Corporation
Rochester, New York
(11766)

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15 pp

QUESTION PRESENTED

Whether an automatic teller machine neither owned, rented, maintained, nor controlled by a national bank is a "branch" of that bank "establish[ed] and operate[d]" by the bank, within the meaning of 12 U.S.C. § 36.

PARTIES TO THE ACTION

This brief is respectfully submitted in opposition to the petition for a writ of certiorari of petitioners Independent Bankers Association of New York State, Inc. ("IBANYS") and The Canandaigua National Bank and Trust Company ("CNB") by respondent Wegmans Food Markets, Inc. ("Wegmans").*

Petitioners allege in their petition that Wegmans has no further interest in this case. *See* Petition for a Writ of Certiorari ("Pet.") at ii (June 28, 1985). The petition makes clear, however, that IBANYS and CNB seek a reversal of the decision of the Second Circuit Court of Appeals in *Independent Bankers Association of New York State, Inc. v. Marine Midland Bank,* 757 F.2d 453 (2d Cir. 1985), that Wegmans' automatic teller machine ("ATM") in Canandaigua, New York is not a bank branch established and operated by respondent Marine Midland Bank, N.A. ("Marine"). Such a reversal would greatly impair Wegmans' efforts to offer its customers the convenience of conducting at its stores a variety of financial transactions with numerous financial institutions. A reversal would threaten similar efforts of numerous businesses like Wegmans across New York State. Thus, Wegmans' interest — the interest of many nonbanking businesses in the State — is very real.

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* Following, as required by Rule 28.1 of the Rules of this Court, is a listing of parent companies, subsidiaries (except those wholly owned), and affiliates of respondent Wegmans Food Markets, Inc.: Wegmans Enterprises, Inc.; Wegmans Express, Inc.

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BRIEF FOR RESPONDENT WEGMANS FOOD MARKETS, INC. IN OPPOSITION

STATEMENT OF THE CASE

Wegmans owns a supermarket in Canandaigua, New York in which it has installed an ATM. Marine, a national bank, entered into an agreement with Wegmans in January 1983 permitting

Marine depositors to use the Wegmans ATM. The ATM is owned and controlled by Wegmans. As noted by the Second Circuit:

> Deposits are placed in envelopes marked "Wegmans Electronic Teller Deposit/Payment Envelope" and dropped through a slot in the machine into a secured deposit box maintained by Wegmans. The customer receives a receipt marked "Electronic Teller Wegmans," which reflects the amount indicated on the keyboard.

757 F.2d at 455. The ATM is a "shared" ATM providing access by depositors to their accounts in a number of financial institutions.

On appeal from a decision in the Western District of New York permanently enjoining Marine's use of the Wegmans ATM, the Second Circuit held unanimously "that Marine's use of the Wegmans shared ATM, which Marine neither owns nor rents, does not constitute the establishment and operation of a branch under the McFadden Act." *Id.* at 463. The court of appeals also vacated the pendent state claim against Wegmans, and dismissed that claim without prejudice. *Id.* at 465.

SUMMARY OF ARGUMENT

An automatic teller machine neither owned, rented, maintained, nor controlled by a national bank is not a branch of a national bank within the meaning of the McFadden Act, 12 U.S.C. § 36. The decision of the Second Circuit Court of Appeals to that effect is not inconsistent with prior decisions of other circuits or of this Court. Instead, the Second Circuit's decision is a reasonable interpretation of the statute in full accord with that of the Comptroller of the Currency and the District of Columbia Circuit Court of Appeals.

ARGUMENT

Petitioners identify three questions presented by their petition. Each of those questions, however, is subsumed by the single question identified above. The following argument demonstrates that petitioners' reasons for granting a writ of certiorari are insufficient to warrant this Court's consideration of the question presented or any arguably related questions.

POINT I
There Is No Conflict Among The Circuits

Petitioners assert that the decision of the Second Circuit is in conflict with earlier decisions of other courts of appeals. Notwithstanding the fact that petitioners argue initially that the issue presented in this case is a matter of first impression, which necessarily eliminates the possibility of conflict, a fair reading of the decisions cited by petitioners clearly refutes their contention that the decision of the Second Circuit is in conflict.

In *Independent Bankers Association of America v. Smith,* 534 F.2d 921 (D.C. Cir.), *cert. denied,* 429 U.S. 862 (1976), the District of Columbia Circuit held that a bank does not establish a branch under the McFadden Act unless the subject ATM is "owned or rented" by the bank. 534 F.2d at 941, 951. Observing that the *Smith* "phraseology" was "more than an off-handed parenthetical," 757 F.2d at 462, the Second Circuit adopted as its own the precise language used twice by the District of Columbia Circuit in its decision. That same language is what the Comptroller of the Currency has used as his standard since the *Smith* decision in 1976. Indeed, the Comptroller's current regulation is based squarely on that decision. 12 C.F.R. § 5.31(b) (1984). Contrary to petitioners' assertions, Pet. at 26-27, the Second Circuit has not adopted the "owned or rented" language as a replacement for the statutory standard provided by Congress. The court

has merely sought to provide reasonable meaning to the words "establish and operate" in the context of shared ATMs and with a view towards Congress' concern that branching of national banking associations be regulated in a thoughtful fashion.

The decision of the Second Circuit is consistent with the Comptroller's "reasonable construction" of the Act. 757 F.2d at 462. Moreover, the decision is consistent with the practical considerations raised by the *Smith* court. As noted by the Second Circuit,

> [T]he *Smith* court apparently recognized that without the requirement that a facility be "established (i.e., owned or rented)," the definition of "branch" would be broad enough to include almost any means of communicating instructions to a bank and in theory could bar such accepted conveniences as banking by mail and banking by telephone.

Id. (citations omitted).

The Second Circuit's decision likewise does not conflict with decisions of other circuit courts of appeals. Each of the other three decisions on which petitioners rely cited *Smith* with approval, and each apparently involved unshared customer-bank communication terminals ("CBCTs") owned or rented by national banks.

In *Illinois ex rel. Lignoul v. Continental Illinois National Bank and Trust Co.*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976), the court considered unshared CBCTs owned by two national banks. *See Illinois ex rel. Lignoul v. Continental Illinois National Bank and Trust Co.*, 409 F. Supp. 1167, 1168-70, 1180 (N.D. Ill. 1975). Likewise, in *Missouri ex rel. Kostman v. First National Bank in St. Louis*, 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976), the Eighth Circuit addressed the operation of unshared CBCTs by a national bank. *See Missouri ex rel. Kostman v. First National Bank in St. Louis*, 405 F. Supp. 733 (E.D. Mo. 1975). Thereafter, the Tenth Circuit in *Colorado ex*

rel. State Banking Board v. First National Bank of Fort Collins, 540 F.2d 497 (10th Cir. 1976), *cert. denied,* 429 U.S. 1091 (1977), considered the status of an unshared CBCT installed by a national bank some 2.8 miles from its main offices. *See Colorado ex rel. State Banking Board v. First National Bank of Fort Collins,* 394 F. Supp. 979, 981-83 (D. Colo. 1975).

The differences between a national bank's branch office and Wegmans' ATM are significant. The Second Circuit reasoned:

> Marine determines where a branch office will be located in light of its own judgment concerning banking needs; Marine owns or rents the facility and maintains it; Marine controls customer access and publicly identifies the facility as its own. With Wegmans' ATM, however, Wegmans decided to install it to attract customers for its store; Wegmans owns the machine and maintains it; Wegmans apparently decides whether to allow customers of different banks to use it; and customers do not view the machine as belonging to Marine.

757 F.2d at 462. The differences are obvious, and the reasons articulated by petitioners for granting a writ of certiorari are simply insufficient to warrant further consideration of those differences by this Court.

POINT II

The Decision Of The Second Circuit Is Consistent With The Decisions Of This Court

Petitioners also contend that the decision of the Second Circuit is in conflict with prior decisions of this Court. First, petitioners maintain that the decision is contrary to the holding in *First National Bank in Plant City v. Dickinson,* 396 U.S. 122 (1969). In this case, however, the essential facts are distinctly different.

The indicia of ownership and control of the armored car and off-premises receptacle at issue in *Plant City* simply left no doubt

about establishment and operation by the petitioner bank. According to the Court,

> The armored car was owned and controlled by the bank; the teller and driver-guard in the car were bank employees. The bank paid the cost of armored car operations and assumed complete responsibility for the monies, checks, and deposits during transit by means of an insurance policy bought and paid for by it to protect the customer and the bank. . . . The truck bore the name of the bank and had two-way radiophone communication with the bank. All movements and routing of the armored car were directed by the bank.

396 U.S. at 128. The off-premises receptacle was located "in a space leased by the bank." *Id.* Over the dissents of Justices Douglas and Stewart, the Court held that the armored car and off-premises receptacle were bank branches established and operated by the petitioner.

Contrary to the assertions of petitioners here, the Court in *Plant City* had no occasion to consider whether a bank establishes and operates a branch when it neither owns, rents, maintains, nor controls the facility at issue. The focus of the Court was not on the facility itself, but on the nature of the transactions between the bank and its customers. The issue was whether bank customers were making deposits within the meaning of section 36(f). 396 U.S. at 135-37. In this case, there is no dispute that users of the Wegmans ATM make deposits.

Second, petitioners suggest that the Second Circuit's decision contravenes this Court's opinion in *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). Their citation to *Walker Bank*, however, stands for nothing more than the proposition that Congress sought to foster "competitive equality" in passing the McFadden Act. Indeed, the *Walker Bank* Court observed that "it appears beyond question that the Congress was continuing its policy of equalization first adopted in the

National Bank Act of 1864." *Id.* at 261. The Second Circuit was fully cognizant of and endeavored to accommodate that policy in its decision.

Petitioners maintain finally that under standards propounded by this Court the Comptroller's interpretation of section 36 should be disregarded. As observed by petitioners themselves, however, "the Comptroller is expressly entrusted with the duty to review and approve or disapprove applications for new national bank branches based upon the provisions of state statutory banking law." Pet. at 19-20 (citing 12 U.S.C. § 36(c),(e)). Moreover, as stated by the Second Circuit, deference to the interpretation of "the administrative agency charged with [the McFadden Act's] enforcement" is "particularly appropriate" in this case. 757 F.2d at 461. *See Investment Company Institute v. Camp,* 401 U.S. 617, 626-27 (1971). "Fashioning policies in response to events that were unforeseeable when the legislation was written is one of the primary functions of executive agencies." 757 F.2d at 461. According to the Second Circuit, "as best we can tell, the agency's interpretation in fact appears to promote the purposes of the McFadden Act." *Id.*

Petitioners contend that a 1978 ruling by the Federal Reserve Board on an "accommodation transaction service" offered by several commonly owned banks dilutes the authority of the Comptroller's interpretation. The Court need only note that in July 1984 the Board joined with the Comptroller in submitting an *amicus* brief to the Second Circuit urging reversal of the district court's decision in this case. The Board and the Comptroller argued together that an ATM is not a branch if it is not owned or rented by a bank, and that the Comptroller's interpretation is entitled to deference. Brief of Amici Curiae Comptroller of the Currency and Board of Governors of the Federal Reserve System, 757 F.2d 453 (2d Cir. 1985).

Whether the use of shared ATMs should be further restricted is, in light of concerns for "competitive equality" and in light of the relatively recent development of technologies like ATMs, a public policy matter that should only be addressed by Congress. Significantly, Congress has failed to take any action even hinting that it is opposed to the interpretation of section 36 adopted by the Comptroller. 757 F.2d at 461-62.

The period of time during which Congress has permitted the Comptroller's interpretation to stand is not nearly as short as suggested by petitioners. Although the Comptroller's interpretation was not codified in the Code of Federal Regulations until July 1982, the interpretation about which petitioners complain was adopted by the Comptroller in 1976 when the *Smith* case was decided. Reliance on that interpretation has been extensive, and Congress has failed to act "despite numerous suggestions that it do so." 757 F.2d at 461. Petitioners' reliance (Pet. at 23) on the comment of this Court in footnote 11 of *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969), is misplaced. Petitioners point to no "unsuccessful attempt" at legislation. Indeed, in the words of the *Red Lion* Court, the Second Circuit applied the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." *Id.* at 381 (footnote omitted).

POINT III

Whether A Shared ATM Owned By A Grocery Store Chain Is A Bank Branch Established And Operated By A National Bank Falls Far Short Of Deserving This Court's Attention

Maintaining that the Second Circuit has carved a "loophole" in the National Bank Act, petitioners argue that the question presented is a matter of first impression and involves issues of national significance. The stridency of their arguments fails, however, to erase the fact that the Second Circuit simply construed a statute in light of the facts of a particular case. The statute here has been addressed more broadly by other circuit courts of appeals and, as demonstrated above, the Second Circuit's decision does not conflict with those earlier decisions. The case is a matter of first impression only because no court has been presented with the issue of a shared ATM located in a home office protected community. The Second Circuit's decision is widely significant only because there are increasingly large numbers of ATMs not owned or rented by national banks. Moreover, this growth is a direct result of the holding in the *Smith* case and the Comptroller's ruling based on that holding.

According to petitioners, the decision of the Second Circuit portends a "specter" and a "debacle" of destruction of the dual system of state and national banks. Pet. at 15-16. Notwithstanding the inability of the judicial system to determine and evaluate such a matter of public policy, the record in this case fails to substantiate petitioners' concerns. How, why, or when CNB or the members of IBANYS will suffer adverse competitive effects is simply not a matter of record. Petitioners do nothing more than speculate in an area that the Second Circuit has admitted it is "ill-equipped" to evaluate fully and has properly left to the judgment of Congress. 757 F.2d at 461.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
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